



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

1052406

**JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE**

AM2014/305

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/305)**

Sydney

10.01 AM, FRIDAY, 18 SEPTEMBER 2015

Continued from 17/09/2015

PN6790

JUSTICE ROSS: Are there any additional appearances to those who were announced during the mention at 9.15?

PN6791

MR SECK: May it please the Commission, Seck, spelt S-e-c-k, initial M. I appear for the Pharmacy Guild of Australia in lieu of Ms Wellard.

PN6792

JUSTICE ROSS: Anybody else, no?

PN6793

MR CLARKE: If it please the Commission, Clarke in Brisbane.

PN6794

JUSTICE ROSS: Thank you. As a result of the proceedings earlier this morning, we needn't deal with the Baxter and Pratley affidavits. That means there are three matters before us and the objections to the Pezzullo report, the objections to the Lewis report and the objections to the Sands report. Unless anyone has a different view, we might deal with the Pezzullo matter first. What do you want to say about that?

PN6795

MR SECK: May it please your Honour, hopefully your Honour and the Full Bench has a copy of an outline of submissions which we filed this morning.

PN6796

JUSTICE ROSS: Yes, we have that.

PN6797

MR SECK: Primarily designed as an aide-memoire to assist in the oral submissions this morning and hopefully I've addressed some of the questions that were put by the Full Bench in the directions yesterday. I should also formally read the affidavit of Sharlene Wellard, sworn yesterday, which is the 17th of September 2015, so I read that affidavit.

PN6798

JUSTICE ROSS: Do you require Ms Wellard for cross-examination?

PN6799

MR MOORE: No, your Honour.

PN6800

JUSTICE ROSS: Do you want us to mark the affidavit?

PN6801

MR SECK: May it please your Honour.

PN6802

JUSTICE ROSS: I'll mark it exhibit PG1.

**EXHIBIT #PG1 AFFIDAVIT OF SHARLENE WELLARD DATED
17/09/2015**

PN6803

MR SECK: Thank you, your Honour.

PN6804

JUSTICE ROSS: You've read your submission, what do you want to particularly focus on?

PN6805

MR SECK: Just a number of the key aspects, your Honour. The first issue I should focus on is the nature of the report and their authorship. As your Honour, the President, pointed out this morning the Pezzullo report is really a product of the efforts of a multidisciplinary team which has been led by Ms Pezzullo as the lead partner of Deloitte Access Economics.

PN6806

The annexure SW1 to the affidavit of Ms Wellard, exhibit PG1, relevantly sets out a short biography of the team members who were involved in the preparation of the report. I haven't addressed this in detail in my submissions but if I may take the Full Bench to the letter of engagement, starting at page 2 under the heading 'our team' in part 3. It relevantly sets out the biography of Ms Pezzullo and her other team members who were involved in declaring the Pezzullo report. Firstly to note Ms Pezzullo's qualifications and experience are firstly set out in a curriculum vitae which forms part of the Pezzullo report but is amplified, at least in relation to her expertise in workplace relations matters, at the bottom of page 2, looking at the page numbers at the top.

PN6807

The Full Bench will note that Ms Pezzullo's expertise and experience includes, starting four lines from the bottom, conducting numerous health workforce studies and analyses of the impact of the regulation and labour markets, particularly in relation to workplace health and safety and impacts of awards conditions in relation to nursing work workforce participation and costs. Lyn has also led various consumer preference and employee preference studies, for example, discrete choice modelling studies of healthcare consumers and studies of work-life balance using mixed qualitative and quantitative methods, quite apt in relation to the nature of the matters which are the subject of the report. And it says:

PN6808

Lyn's role in this project at PGA would be to provide quality control and oversight of all deliverables.

PN6809

I might then just highlight some of the key parts of the other team members. If the Full Bench can go down to the third paragraph on page 3, there's a reference to Mr David Rumbens, R-u-m-b-e-n-s, partner at Deloitte Access Economics. His qualifications are set out there. Relevantly, just looking at the last three lines, Mr Rumbens' expertise includes a range of labour market analysis projects including detailed modelling of the Australian Workforce and Productivity Agency and

Queensland Ministerial Industry Commission, along with a scoping study of the effect of penalty rates in the Queensland tourism industry.

PN6810

I might go down to Mr Paul Barnsley's bio. He is identified as having a strong background in microeconomics, econo-electrics cost benefit analysis, patient reported outcomes, decision-making and uncertainty, and then moving down to Mr Stevens' bio, he has a background in quantitative methods, survey design, undertaking data collection and processing, including regression analysis, and lastly the biography of Mr Adam Elderfield, E-l-d-e-r-f-i-e-l-d, and relevantly he has expertise working for the Queensland Department of Justice and Attorney General with a scoping study into the empirical analysis of penalty rates of employment, and there's a reference to the particular study to which Mr Rumbens was also involved regarding the detailed modelling of the effect of penalty rates in the Queensland tourism industry.

PN6811

Given the nature and scope of the project it's unsurprising that there were multiple people involved in the preparation of the report, but ultimately Ms Pezzullo as the lead partner expresses her views based on the findings which have been produced as a result, so what I want to make clear is that whilst there were multiple people involved from a variety of disciplines, Ms Pezzullo as the lead partner is expressing her opinion for the purposes of these proceedings, and she's - - -

PN6812

JUSTICE ROSS: You're putting it on the basis Ms Pezzullo has the requisite expertise covering all matters in the report?

PN6813

MR SECK: Indeed, your Honour.

PN6814

JUSTICE ROSS: Why don't we have a statement from Ms Pezzullo to that effect, as we have a supplementary statement from Sands?

PN6815

MR SECK: We don't have words to that effect, and your Honour the President is completely correct, and we can put on a supplementary statement for Ms Pezzullo stating words to that effect.

PN6816

JUSTICE ROSS: Well, I mean, it's quite a thin – the CV doesn't say that in relation to the report that's provided, and we don't have any other evidence, and whilst what you say about the team might be right you're not proposing to call them.

PN6817

MR SECK: That's so, your Honour. It's like any - - -

PN6818

JUSTICE ROSS: So what's the relevant of their expertise if you're not proposing to call them?

PN6819

MR SECK: The relevance of their expertise is obviously that others have been involved in the preparation of the report, which Ms Pezzullo has supervised but also reviewed and adopted as her view, so what I'm saying, your Honour, is that ultimately whilst the team is involved in preparing the report, it's Ms Pezzullo who takes responsibility for it and expresses her opinions, to the extent there are opinions expressed in the Pezzullo report, as her own.

PN6820

JUSTICE ROSS: All right, thank you.

PN6821

MR SECK: I think what it's also then next important to do, your Honour, is to understand the nature of the matters contained in the Pezzullo report and the findings which the Pharmacy Guild wishes to elicit or rely upon, arising out of the Pezzullo report. In a letter from my instructing solicitors, Meridian Lawyers, dated 4 September 2015, the Pharmacy Guild set out the findings that are sought to be derived from Ms Pezzullo's report.

PN6822

There are relevantly three parts to the Pezzullo report. There's an introductory - -
-

PN6823

JUSTICE ROSS: Do you have a copy of that letter?

PN6824

MR SECK: It was filed with the Commission on 4 September. I only have one copy in front of me, but we can – I apologise.

PN6825

JUSTICE ROSS: That's all right.

PN6826

MR SECK: Your Honour, I don't have a copy of that, but what I can do is, read out the findings which are sought.

PN6827

JUSTICE ROSS: No, no, that's all right. I'd rather get a copy.

PN6828

MR SECK: May it please. There are relevantly three parts to the Pezzullo report. There are relevantly three parts to the report, your Honour. There's a part which is really an overview of the various industries and relevant awards, a second part which sets out a literature review of the economic issues and a third part which sets out the outcome of the survey and some interpretation of those survey results.

PN6829

In my submission, it's important to look at each of those parts discreetly and examine whether or not, in effect, an opinion is expressed in those parts of the report to ascertain whether or not there's any validity to the objections which have been raised by the unions to the report.

PN6830

I'm not sure whether or not the Full Bench has a copy of the Pezzullo report in front of them, but it might be helpful for current purposes to look at the report to demonstrate that the report, in effect, doesn't express any findings perse, but what it seeks to do is merely act as a conduit for the expression of particular information that's been researched or elicited in particular ways.

PN6831

Might I take the Bench initially to part 2 of the report? I'm using the page numbers in the bottom right-hand corner, it's at page 4.

PN6832

JUSTICE ROSS: Bear with me for a second.

PN6833

MR SECK: The Bench will see, in part 2, that the introductory part sets out a very brief history of the award modernisation process and a view of the industry awards and a profile of the various industries, in particular the retail industry, the hospitality industry, the fast food industry, the restaurant industry and the pharmacy industry, by reference to data contained in either the Australian Bureau of Statistics and other locations.

PN6834

The material there, is really by way of background ultimately, and in my submission, to the extent that it does seek to elicit information, the sources of that data are clearly identified. No opinions are expressed in that part of the report.

PN6835

Part 3 of the report, which starts at page 12, sets out- - -

PN6836

JUSTICE ROSS: This is the literature review?

PN6837

MR SECK: Pardon me?

PN6838

JUSTICE ROSS: This is the literature review?

PN6839

MR SECK: This is the literature review.

PN6840

JUSTICE ROSS: I might note, in passing, I think some of the other employer organisations are objecting to some of the union expert evidence on the basis that it's a literature review.

PN6841

MR SECK: Indeed.

PN6842

JUSTICE ROSS: Consistency doesn't seem to be a thread that's running through any of this.

PN6843

MR SECK: It doesn't. I suspect that might be from abundant cautioning case, one party's evidence gets knocked out, they want to have that apply equally, your Honour.

PN6844

But the literature review, which is set out in part 3 of Ms Pezzullo's report, in effect, it summarises key articles which have been identified as a result of a Google Scholar Search- - -

PN6845

JUSTICE ROSS: Yes.

PN6846

MR SECK: - - - on various topics including trend in working hours, the effect of penalty rates and staffing, preferences to work and work/life stress, consumer activities on weekends and wage elasticity of labour demand and supply. And then there's a summary of the particular literature.

PN6847

It is not uncommon, as the Full Bench would be aware from minimum wage reviews, to actually examine the existing literature to ascertain what that literature says on particular topics. The courts have considered the question of whether or not a literature review, which has been undertaken by an expert, in effect constitutes the expression of an opinion, for the purposes of the Evidence Act. And there is a relevant case, which I set out in my submissions, in paragraph 18 starting at page 5. And I do have a copy of that decision for the Full Bench, and I might hand up that copy.

PN6848

It's a decision of *BI (Contracting) Pty Limited v University of Adelaide* [2008] NSWCA 210. Might I take the Bench to paragraph 23 onwards? Regrettably, the copy of the decision I have is not paginated, but if your Honours go about five pages in.

PN6849

JUSTICE ROSS: Yes. Which paragraph, I'm sorry?

PN6850

MR SECK: Starting at paragraph 21 initially, your Honour. Your Honour will see what - the issue in this case was that there was an objection taken to a literature review which was undertaken by an expert to ascertain the state of knowledge at a particular point in time. This particular case was about exposure to asbestos in 1961. The objection was taken that the relevant expert didn't have

expertise in the particular issue, all that Mr Parker – sorry, all that the expert did in this particular case was to examine the academic literature material that was available in 1961 and act as a conduit for the presentation of that material.

PN6851

In paragraph 23, the NSW Court of Appeal, which comprised of Beasley J, as she then was, Bell J, as she then was and the Chief Judge in Common Law, McClellan J referred to an article by Sir Richard Eggleston in Evidence, Proof and Probability and I just wish to read out the quote, because I think it's particular apposite for this case.

PN6852

The second function of the expert to which we referred above was acting as librarian. In many cases, the expert does not himself know the answer to the problem from his own study or experience, but being trained in the relevant discipline, he is able to refer to works of authority in which the answer is given. In such a case, the expert himself is not generalising, but is making available the fruits of generalisations by other people either from their own experience or from the experience of others whose writing form part of the literature. The expert witness here is not giving evidence of his own opinion, except to say, in his expert opinion, the books to which he is making reference are of sufficient standing to be accepted by the court.

PN6853

In my respectful submission, the proposition which is expressed in Sir Richard Eggleston's book is applicable to the expert evidence of Ms Pezzullo in part 3. What she simply does, as a trained economist, is to undertake a literature survey, review that literature survey and set it out. The Court of Appeal then goes on to say, in paragraph 23, this:

PN6854

The discussion was directed to a different issue, however the point that Sir Richard makes concerning the 'librarian function' of the expert, seems to me to be relevant in the present context. The expert study and training equips them to undertaking a literature review and to assist the court to understand the significance of what is contained in it. The expert is available to be cross-examined. In Mr Parker's submission, an expert who is not in practice in the field at the date of publication of the article is not qualified to express an opinion about the authority of the article or the standing of the journal at the date of publication. I do not accept this is so. An opinion that is a journal was authoritative in 1961 does not involve conjecture about what people believed in 1961 but is likely to be an inference drawn from the quality of the articles appearing in the journal over a period and the references to it, etc.

PN6855

Now, whilst it's a slightly different context to the present case, in my respectful submission, what can be elicited from, or what can be drawn from that decision is of relevance here. Ms Pezzullo in reciting the particular expert reports is merely setting out what the existing academic literature says on that particular topic. She is not expressing her own view on the particular issue, but she is merely assisting

the court to communicate the existing state of knowledge on particular subject areas which are relevant in these proceedings.

PN6856

There are also references in paragraph 17 of my submission to other cases where that has been done. It's quite commonly done in native title cases where anthropological evidence is ascertained to looking at academic articles and it has been well accepted in those cases that that represents a legitimate method for eliciting evidence for the assistance of the court.

PN6857

Might I then turn to part 4 of the Pezzullo report. Part 4 begins on page 22. What part 4 contains is the results undertaken from a survey conducted by i-Link Research Solutions. The sampling is set out there and the response is set out and the methodology for conducting the survey in terms of response validation and mitigating for potential bias is clearly identified on page 22 of the report.

PN6858

If the Bench is interested the relevant survey which was placed online is set out in Appendix A starting at page 47 and quite clearly sets out the questions asked of the participants to the survey.

PN6859

What Ms Pezzullo then does is that by looking at the survey she seeks to summarise the survey results and interpret the data which arises out of the survey, and she quite clearly bases her interpretation of that data based on the survey results and seeks to fortify it by reference to the academic literature.

PN6860

What Ms Pezzullo is doing there, your Honour, is either admissible as direct evidence of an issue in the case, namely the state of public perception, which is plainly relevant to the Commission, but also seeks to use that original data as the foundation for her own evidence in interpreting the data. There is no special knowledge required to actually look at data and then seek to draw conclusions from it, it merely involves an examination of that data and then hypothesising conclusions that one might draw from that data. Whether or not Ms Pezzullo is an expert in labour market economics or in the particular field of the impact of penalty rates in a particular industry or business sector is not going to assist her ultimately in interpreting the results. All that is required of Ms Pezzullo in this particular case is to look at those results and seek to draw inferences of conclusions which will hopefully be extrapolated as the basis of submissions that the Pharmacy Guild wishes to make in these proceedings.

PN6861

As your Honour the President pointed out during the directions hearing it is not uncommon for the Full Bench to rely upon survey results in relation to determining increases in minimum wages and the like, and it is also not an uncommon method used in courts of law for ascertaining for example whether or not there has been passing off or misleading and deceptive conduct in a particular market, amongst other things.

PN6862

The issue of the admissibility of survey results and their interpretation has just been recently considered by Justice Nicholas in the Federal Court, and I wish to hand up this decision. It's Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd [2015] FCA 227. Might I hand up copies of that decision.

PN6863

JUSTICE ROSS: Thank you.

PN6864

MR SECK: If the Bench could go to page 73 starting at paragraph - - -

PN6865

JUSTICE ROSS: Rather than read it to us can you tell us the proposition it stands for given we have got limited time this morning.

PN6866

MR SECK: Yes. The propositions are simply this, that survey evidence and the interpretation of the data can be admissible on two grounds under the Evidence Act. The first is that the survey evidence itself is admissible as an exception to the hearsay rule. That exception to the hearsay rule is set out in section 66A of the Evidence Act where it doesn't apply to representations if the representation was contemporaneous in nature about the person's health, feelings, sensations, intention, knowledge or state of mind. Plainly the survey results are admissible as to those particular matters.

PN6867

Then secondly to the extent that Ms Pezzullo seeks to interpret the data then it's acceptable under section 79(1) of the Evidence Act because she is simply seeking to draw conclusions from objective data about the state of public perception on various particular issues. That proposition was ultimately accepted by Justice Nicholas and he sets out the relevant law on this particular issue in paragraphs 310 to 319 of the decision. I won't read that out, but in my respectful submission he quite clearly and unambiguously sets out the legal basis upon which such evidence can be relied upon as reliable and therefore admissible in a court of law. A fortiori, in my submission, the evidence is also admissible in these particular proceedings.

PN6868

That summarises the principal points I wish to make about the admissibility of the reports. Overall I would submit that the reports chiefly do not set out opinion and they shouldn't be accepted as opinion. To the extent that there's any interpretation of the results there is no special expertise required to interpret the results. All Ms Pezzullo is simply doing is summarising the data and hypothesising as to what that data may show.

PN6869

JUSTICE ROSS: If none of it sets out opinion why is it sought to be put in as expert evidence?

PN6870

MR SECK: It is being put as common evidence, your Honour, and it is being done through Ms Pezzullo as someone who has expertise in the conduct of surveys and interpreting results. As your Honour would have noted from the CV of Ms Pezzullo she does have experience and expertise in the interpretation of consumer and employee preferences. What in effect is being sought to be done here is to elicit from the survey data consumer and employee preferences in relation to a whole range of matters. Your Honours have a copy now as I understand it of the findings that the Pharmacy Guild wish to rely upon arising out of Ms Pezzullo's report, and I won't read it all out, but the findings are set out in paragraphs 1(a) to 1(l).

PN6871

In my respectful submission when one looks at the findings which the Pharmacy Guild wishes to rely upon they solely derive from the survey results and not from any expression of opinion of Ms Pezzullo. All Ms Pezzullo does is sought to organise and martial those results in a way which is easily digestible and understandable for the Commission's benefit. May it please.

PN6872

JUSTICE ROSS: Just bear with us for a moment. Don't panic, Mr Moore, we are not - - -

PN6873

MR MOORE: I hope you are not going to gang up on me.

PN6874

JUSTICE ROSS: Speaking for myself I am not sure on what basis this evidence is put forward now, and I'm not sure what is said about the opinion evidence but where we have landed is this, that there should be discussions between the parties, with a view to dealing with any objections in relation to opinion evidence. If you say there is none, then deal with that issue. It may be that this doesn't go in as an expert report at all, it goes in, in some other form. The survey material is in lay evidence in other areas, sometimes it is filed in the lay evidence but is put by an expert. So, for myself, I'm a bit confused on the basis in which you are putting it.

PN6875

Having said that, we're conscious we have got two other matters to deal with and we would both, (1) encourage you to have those discussions, (2) normally we would approve an expert as to their expertise by a statement from the expert, we don't yet have that. You would have leave to file that by 4 pm Monday. We would relist this matter, the Pezzullo objection, for 1 pm next Friday at the break in the other expert evidence on that day, and we will see - we will hear from Mr Moore at that stage if - after discussions with you, about both the characterisation of the evidence, whether it can be split, or whether there are redactions on the basis of opinion, et cetera. Whether that can be a way through it.

PN6876

But in fairness to Mr Moore, I mean it has only been put this morning that it somehow common evidence and not expert evidence, and I'm not sure what all that means. And you say there is no opinion, well, I'm not sure that's right. There

are some statements in the report that could be regarded as expressions of opinion, but certainly the setting out of ABS data and the summarising of that material and a literature review is also material that is common in the union material that they're seeking to file as well. So I encourage everyone to think about the repercussions of taking positions in relation to some of that material.

PN6877

But it may be how it's characterised, and it may be capable of being dealt with by discussion and redaction, but we want you to have that discussion first before we find ourselves having to rule on the matter. All right?

PN6878

MR SECK: May it please, your Honour.

PN6879

MR MOORE: Your Honour, can I just raise one matter.

PN6880

JUSTICE ROSS: Sure.

PN6881

MR MOORE: I am caught by surprise as to the submissions my learned friend puts. Do I understand that what your Honour envisages is that discussions occur between us to see what common ground, if it might be able to be reached. And that such common ground might be, as one example, the redaction, if you like, of the opinion-based elements within the report.

PN6882

JUSTICE ROSS: Yes.

PN6883

MR MOORE: Of which there are numerous, and I was going to take the Bench to those parts.

PN6884

JUSTICE ROSS: Yes.

PN6885

MR MOORE: Is that as I understand - - -

PN6886

JUSTICE ROSS: That's right.

PN6887

MR MOORE: Yes.

PN6888

JUSTICE ROSS: Because, look, if you look at the survey material, while similar material has been - leave aside for a moment the opinion aspects of that, but the reporting on a survey and survey results has been the subject of lay evidence in the proceedings to date and, on its face, doesn't appear exceptional, its broad proposition. But I'm not - I tend to agree with you that I wouldn't characterise the

report as being opinion-free. And I think if it's being put by the Guild, that it's not intended to be expressing any opinions, then that might provide a basis for discussion and redaction.

PN6889

MR MOORE: It may. Thank you.

PN6890

MR SECK: We will have those discussions with the unions, your Honour. Can I just make it clear, we don't say it's opinion-free, it does contain opinion to the extent it interprets the data, but we will have those discussions and see whether or not we can resolve the issues.

PN6891

JUSTICE ROSS: Well, that might give rise to - that might be something you can think about. Because if the data is in, well, there is an issue about why can't you make submissions about the data.

PN6892

MR SECK: We can probably do that, your Honour, but there is probably multiple union reports which seek to interpret Wiley data and Hilda data as well, of a similar nature.

PN6893

JUSTICE ROSS: Well, that's why I want you to have the discussion because I'm conscious of that, and also of the literature review point.

PN6894

MR SECK: Indeed, your Honour, and I accept what your Honour says about that. We will have those discussions and see whether or not we can sort the issues out.

PN6895

JUSTICE ROSS: Well, we are anxious to find a practical way through this issue so that we have relevant material before us.

PN6896

MR SECK: Indeed, your Honour.

PN6897

JUSTICE ROSS: So if you can each bear that in mind and it may also provide a basis for the resolution of some of the other objections to the union material, and they will be the subject of the conference before Vice President Catanzariti on Thursday.

PN6898

MR SECK: May it please.

PN6899

JUSTICE ROSS: Can I ask you if you can also provide an oral report to the Vice President at that conference about where you are up to in relation to this matter.

PN6900

MR SECK: We shall do so.

PN6901

JUSTICE ROSS: All right. Which ones are convenient to deal with next? Lewis or Sands?

PN6902

MR IZZO: I'm happy to address Professor Lewis but I heard whispers from the other side of the Bench saying they wanted to deal with Professor Sands. So - - -

PN6903

JUSTICE ROSS: Okay. Sands. Mr Wheelahan.

PN6904

MR WHEELAHAN: Thank you. This morning my instructor filed and served a supplementary statement of Mr Sands - Dr Sands.

PN6905

JUSTICE ROSS: Yes.

PN6906

MR WHEELAHAN: I tender that statement with the attachments.

PN6907

JUSTICE ROSS: Is Dr Sands available for cross-examination?

PN6908

MR WHEELAHAN: We are awaiting his response as to whether he is available today but he is, in principle, available.

PN6909

JUSTICE ROSS: Well, it's going to have to be before 11.30 because that's when today finishes.

PN6910

MR WHEELAHAN: Yes. He is not in court - he is not in the hearing room now and we are having difficulty getting a response from him but we have asked him to be available today.

PN6911

UNIDENTIFIED SPEAKER: Your Honour, he is not required for cross-examination.

PN6912

JUSTICE ROSS: All right. Thanks. No objection to the tender of the statement?

PN6913

UNIDENTIFIED SPEAKER: No.

PN6914

JUSTICE ROSS: We will mark that exhibit retail 1.

EXHIBIT #RETAIL 1 STATEMENT OF PROFESSOR SANDS

PN6915

MR WHEELAHAN: Your Honour, I also filed and served this morning, or my instructors did, some short submissions.

PN6916

JUSTICE ROSS: Yes.

PN6917

MR WHEELAHAN: I rely on those submissions.

PN6918

JUSTICE ROSS: Yes. We have had the opportunity to read those. Have you had an opportunity to discuss this matter with Mr Moore?

PN6919

MR WHEELAHAN: No, I haven't.

PN6920

JUSTICE ROSS: All right.

PN6921

MR WHEELAHAN: In substance, now that the statement has gone in without objection, at paragraph 34 of the SDA's submissions, essentially their complaint is that he is giving opinions about the economic conditions. Now, those opinions, you will note, are based on raw data where if you have the report, and you will see at placitum 5 and 6, at the beginning of the report, there is a list of figures and a list of tables containing all the various raw data. Now, the report - in the body of the report there are errors, typographical errors, where the figure numbers are incorrect and my instructors are remedying that and a new copy will have to be filed. Now - - -

PN6922

JUSTICE ROSS: When are you planning on doing that?

PN6923

MR WHEELAHAN: Today.

PN6924

JUSTICE ROSS: All right.

PN6925

MR WHEELAHAN: Now, previously Dr Sands has given evidence about the economic conditions in the retail industry previously, and that is exhibit SS2 to his statement, and that exhibit, on the previous occasion in 2012, went in without objection. And that exhibit, if you turn to page 4, which is the executive summary, you will see there that he has given similar opinions, such as retail's challenge being the first one, and you can read there in front of you the four matters which can be characterised as opinion evidence about economic conditions.

PN6926

So it's in that context, and I take you to that to support the written submissions that I have made, to take into account the previous decisions and evidence that has previously been accepted by this tribunal that it's appropriate, when in his current report he expressly states at page 15 that he is building on that previous research that he has already submitted to the Commission.

PN6927

In conclusion given that there is no objection and he is not required for cross-examination Dr Sands has deposed positively that the opinions he expressed are within his specialised knowledge. On that basis it's my contention that the report should be admitted.

PN6928

MR MOORE: Your Honour, and the Full Bench, Dr Sands is an expert in marketing and market research. He's a person with expertise in the field of consumer behaviour and market research. In the relevant part of his report he purports to be an economist to provide a commentary on prevailing economic conditions in the retail industry; that he does not have any specialised knowledge to ground such opinions. That is the short point.

PN6929

When regard is had to the supplementary statement of Dr Sands there is no change, in my respectful view, as to the status of his specialised knowledge. All that is said is that within the unit at Monash University at which he has been located he has overseen certain research which has included tracking conditions in the Australian Retail Industry. He's got a Bachelor of Commerce which it has a speciality in marketing, and a PhD in marketing, and he has published one article in the International Journal of Retail and Distribution Management entitled "Retailers strategic responses to economic downturn: insights from Down Under", and that in my respectful submission does not bring him within a bull's roar of having specialised knowledge to comment on prevailing conditions in the retail sector.

PN6930

Can I just pause and draw to the Full Bench's attention what Dr Sands says in this relevant part of his report, and I will read this to the Bench in case it's not readily at hand, but in his executive summary at the end of the first paragraph, this appears to be the ultimate proposition sought to be advanced from Dr Sands's evidence, he says, quote:

PN6931

The slowdown in retail sales in real prices, decline in retail firm operating profitability, increase in retail business closures and aggregate retail hours worked not recovering to 2007 peak indicates that despite some improvements since 2012 the retail industry continues to struggle.

PN6932

Now that is unquestionably, in my respectful view, an economic commentary where Dr Sands is in short seeking to diagnose the state of economic health of the

retail sector, and as a person with expertise in marketing he simply does not have that specialised knowledge.

PN6933

As to the point my friend makes about the fact that Dr Sands gave evidence in the interim review that is irrelevant, in my respectful view. If a witness comes to the court, an expert witness comes to the court to give opinion evidence the question of the admissibility of that evidence is not to be determined by whether or not in the evidence they purport to give they are referring to evidence they gave in any other proceedings. It's immaterial, it doesn't bear upon the relevant questions. That report in 2012 may have been admitted into the proceeding for who knows what sort of reasons. It doesn't bear upon and is irrelevant to a consideration of the task which the Full Bench should undertake, which is whether or not Dr Sands falls within the exception in section 79 of the Evidence Act. Unless there is anything further they are the submissions.

PN6934

JUSTICE ROSS: Thank you. What do you say in reply?

PN6935

MR WHEELAHAN: In reply to the last point I just direct the Bench's attention to paragraphs 8 and 9 of my written submission where it's expressly said that regard in a conducting review it's appropriate to take into account previous decisions and to look at the proper context of the previous decision, the interim review, where his evidence was accepted without objection by my learned friend. To ignore that when it's expressly stated to be part of the building blocks for this report - and indeed on the last occasion he gave evidence as I have taken the Bench to at page 4 of that report about economic conditions.

PN6936

JUSTICE ROSS: What is Dr Sands's economic expertise?

PN6937

MR WHEELAHAN: It is set out in his supplementary statement.

PN6938

JUSTICE ROSS: Where?

PN6939

MR WHEELAHAN: His qualifications of his - sorry, I will just get it to hand - at paragraph 4(b). I do rely on paragraph 4. Your Honour, on the last occasion, I don't think it's included in the transcript here but I have read it, Mr Moore went on to cross-examine him about his expertise, part of which was his statistical expertise in interpreting data, and many of the opinions that he gives in this report are interpreting that data and he has specialised expertise to do so. In closing he makes the assertion - - -

PN6940

JUSTICE ROSS: I just want to go back to my question.

PN6941

MR WHEELAHAN: Yes.

PN6942

JUSTICE ROSS: Where is his expertise in relation to economics, where do we find that? That is what's put against you.

PN6943

MR WHEELAHAN: I am sorry, I didn't hear the last part.

PN6944

JUSTICE ROSS: That is what's put against you by Mr Moore, that he's expressing opinions about economic trends and he lacks the requisite expertise.

PN6945

MR WHEELAHAN: The expertise he's attested to is at paragraph 4 of his supplementary statement.

PN6946

JUSTICE ROSS: That says that he manages a team of seven people in conducting and delivering commercial research.

PN6947

MR WHEELAHAN: Primary and secondary research.

PN6948

JUSTICE ROSS: It doesn't say that.

PN6949

MR WHEELAHAN: He oversees and conducts the research. I read it as that he actually conducts the research, not merely oversees it.

PN6950

JUSTICE ROSS: No, in conducting and delivering commercial research.

PN6951

MR WHEELAHAN: Yes, in tracking the economic conditions, and he has done so for seven years.

PN6952

JUSTICE ROSS: You're giving evidence now.

PN6953

MR WHEELAHAN: No, I am not, I'm just reading what he has said in his statement.

PN6954

JUSTICE ROSS: Where does the last bit come from is my question?

PN6955

MR WHEELAHAN: Sorry, it's over the page. There's a paragraph 4(a)

PN6956

Our research includes publications focused on monitoring and tracking economic conditions in the Australian Retail Industry.

PN6957

JUSTICE ROSS: I am looking at the wrong one.

PN6958

MR WHEELAHAN: Is it double sided, is it?

PN6959

JUSTICE ROSS: Yes.

PN6960

MR WHEELAHAN: Does your Honour have that?

PN6961

JUSTICE ROSS: Yes, I do.

PN6962

MR WHEELAHAN: Yes, thank you.

PN6963

JUSTICE ROSS: Nothing further in relation to that? We will reserve - - -

PN6964

MR WHEELAHAN: No, I can't rely on anything further than his qualifications that he's attested to and his assertion that it's within his specialisation and he's available for cross-examination.

PN6965

I might add of course it's open to Mr Moore at the time that he is called to cross-examine him on that occasion again if he wants to test his specialised knowledge. I have nothing further, your Honour.

PN6966

JUSTICE ROSS: Thank you. Can we go to the Lewis.

PN6967

MR IZZO: Yes, your Honour. Your Honour, can I ask do your Honours have a copy of the Lewis CV as well as the expert report?

PN6968

JUSTICE ROSS: Yes.

PN6969

MR IZZO: Thank you, Your Honour. Your Honour, I will come back to the CV but the starting point for addressing the objections, I just wanted to note that both United Voice and SDA have objected to two parts of the Lewis report, part 5 and part 6. Part 5 commences at p.32 of the report.

PN6970

The United Voice and SDA objections are based on a characterisation of, if I can just deal with part 5, what is in part 5 and they say, and this is both unions, at paragraph 16 of the United Voice submissions, they say part 5 contains opinions about the origins and history of penalty rates, claim changes over time and religious observance, and claim changes over time in the time use patterns of Australians. That is the three broad opinions that they take issue with. That is from the United Voice submissions but it is the same in the SDA submissions.

PN6971

The reason I start with that is because part 5 doesn't just deal with that and part 5 is objected to in its entirety. It is important to understand that part 5 contains opinions that go beyond those three paraphrased subject matters. I am afraid there is no other way to do it, I think, than to take you to the specific paragraphs that I say fall outside the boundaries of these three characterisations.

PN6972

If I can start, Your Honour, at page 32, under the heading "Are penalty rates relevant to the modern Australian economy." The first two paragraphs contain a discussion by Professor Lewis regarding the Australian economy and how it used to be characterised. He talks about mostly males working full-time in industrial jobs, little part-time or casual work, and the second paragraph goes on to discuss the modern economy.

PN6973

Both paragraphs 1 and 2 are opinions that Professor Lewis expresses in relation to, firstly, the historical labour market and then what we've moved to today. I say that both of those opinions are opinions that fall squarely within his expertise as a professor of economics and that is expertise that has not been challenged by the unions. So that is in relation to those two paragraphs.

PN6974

If I can then take you to page 35 and there's a heading that says "The value of time."

PN6975

JUSTICE ROSS: Yes

PN6976

MR IZZO: Under that heading there is a paragraph, then overleaf there is a graph and there's a conclusion. If I can just take the first paragraph under the heading. Again here, Professor Lewis is talking about how many males and females work on weekends. The graph overleaf expresses that in pictorial form and then he expresses a conclusion about that.

PN6977

Again, that is an opinion he is expressing in relation to working patterns of people on weekends. That is something that falls squarely within his expertise as a professor of economics who specialises in labour markets.

PN6978

JUSTICE ROSS: Where does that take you to? Is that all of 36?

PN6979

MR IZZO: No, Your Honour. I'm just referring to the last paragraph on 35, the graph and then the two line paragraph under the graph.

PN6980

JUSTICE ROSS: Yes, I see.

PN6981

MR IZZO: If I can then take Your Honour to page 38, the third paragraph of page 38, Professor Lewis commences a discussion about the survey or study if you like conducted by Professor Rose. Now, what's happened here is Professor Rose, who is an expert statistician, all things statistics, he has conducted a survey. That survey has been provided to Professor Lewis for the purpose of comment.

PN6982

What Professor Lewis is doing is he is looking at the survey results and he is now drawing conclusions regarding what those survey results mean for the question of labour supply. That is, the supply of labour by employees to the demand of employers. That is a matter which falls squarely within his expertise as an economist and one who specialises in labour markets. That analysis goes from paragraph 3 on page 38.

PN6983

JUSTICE ROSS: Is that starting with "Further evidence"?

PN6984

MR IZZO: That's correct, Your Honour. All the way to the bottom of the second paragraph on p.39. If we look at even that second paragraph on p.39, Professor Lewis starts to talk about what is required to get employees to work on public holidays, whether penalty rates are higher or lower than what is necessary. These are all questions going to supply. So that is what we say in relation to that paragraph.

PN6985

Then, if I can draw Your Honour's attention to - no, I apologise. That is the totality of what I wanted to say about what I say are sections of part 5 which do not fall within the objections that are contained in the United Voice and SDA submissions. So I say that those paragraphs are really untouched by the objections and should - - -

PN6986

JUSTICE ROSS: We might just test with Mr Moore.

PN6987

MR MOORE: I think Mr Dowling is dealing with that.

PN6988

JUSTICE ROSS: Mr Dowling?

PN6989

MR DOWLING: Thank you, Your Honour.

PN6990

JUSTICE ROSS: Just so we know what we're focusing on.

PN6991

MR DOWLING: Yes. I think an efficient way of dealing with this part, Your Honour, is to work backwards and if the Full Bench goes to the summary that Professor Lewis provides - - -

PN6992

JUSTICE ROSS: Yes, on page 39?

PN6993

MR DOWLING: - - - at page 39, that is essence of what he is trying to do in this part. You will see there from the third line it reads:

PN6994

The social mores which have defined Australian society have to a large degree changed radically over time.

PN6995

He gives an example of that and then in the concluding sentence he says:

PN6996

Although most employees do value time on Sundays and public holidays more than time on weekdays, the premium is much less than the current penalty rates.

PN6997

Now, it is that conclusion that is established by the earlier parts and that is the conclusion that he is not qualified to give. That is not a conclusion - - -

PN6998

JUSTICE ROSS: Why isn't he qualified to give the premium? What would be required to attract a supply of labour on a weekend? He's a labour market economist?

PN6999

MR DOWLING: But that is not what he is doing in that conclusion, Your Honour. He is really giving a time value assessment and that is why he spent the preceding five paragraphs dealing with Professor Rose, summarising Professor Rose in circumstances where Professor Rose's report is relied upon and Professor Rose is to give evidence. That is really what he is talking about in the last sentence - sorry, in the second sentence and the last sentence is an assessment about the value of weekends.

PN7000

Some parts that my learned friend skipped over make good that point because if the Full Bench turns back to the start of this part, pages 32 and 33 we accept are really introductory of what it is the part will propose or what it seeks to do. There is much less controversy in respect of pages 33 and 33, we accept that.

PN7001

But if the Full Bench then goes to page 34, you will see it starts with an assessment of Sunday being the day of religious observance and dealing with that is still so or not. Now, yes, there is statistics set out, the National Church Life Survey, but that is all with a view to coming to the conclusion that social mores have changed and there is a different value placed on Sundays because of the religious observance that is dealt with at pages 34 and 35.

PN7002

Now, in our submission, none of that can be described as properly attributable to the area of expertise that is labour economics.

PN7003

COMMISSIONER LEE: But an analysis of work/leisure choice trade-offs, you would agree that that is probably the domain of labour economics?

PN7004

MR DOWLING: Well, that's really Professor Rose, Commissioner. That choice theory and the values derived about those choices is really what Professor Rose is dealing with and we are not assisted, in our submission, by having Professor Lewis summarise what it is that Professor Rose has sought to do. Nobody accepts, nobody puts forward the proposition that Professor Lewis is a behavioural economist and that he is properly qualified to deal with those choice theories. So in respect of the parts that deal with that and summarise Rose, in our submission, Professor Rose's evidence is going to speak for itself and a summary by Professor Lewis doesn't assist and where - - -

PN7005

JUSTICE ROSS: What do you say about that part of Professor Lewis' evidence that appears under the heading "The value of time"? Up until one gets to where he starts dealing with Professor Rose's evidence on page 38?

PN7006

MR DOWLING: We make the same criticism, Your Honour, because you will see it starts with the proposition that:

PN7007

The majority of employees are still in jobs where employment is usually Monday to Friday.

PN7008

It then goes to, over the page, in the middle of the page:

PN7009

It can be concluded the traditionally held view regarding weekends has, for many, been replaced by many as a time for employment.

PN7010

And he then sets out how it is people spend their weekends, dealing with time spent on audio-visual media and other alternatives. Now, again, that's the use of time. That is whether people are using the time for recreation, religious

observance, utilising media or other things, there is nothing - that doesn't enter into the field of labour economics, in our view.

PN7011

JUSTICE ROSS: But he is just reporting on what is in the ABS statistics.

PN7012

MR DOWLING: He is, your Honour, but that is why I said it's a useful exercise to work backwards. He is reporting with a view to coming to the conclusions that he makes in the summary. And the summary is that there is a different value placed on Sundays and public holidays now. Now, it's not for him, in our submission, he is not qualified to make the assessment as the value of Sundays, as a labour economist.

PN7013

JUSTICE ROSS: No, but the same thing can be made as a submission, based on the ABS data.

PN7014

MR DOWLING: It could. And we couldn't stop our friends from doing it. But that is not what we are arguing about here, we are arguing about whether Professor Lewis is properly qualified. It might be an area of expertise, a social scientist or a demographer perhaps, but it's not - it's not within the field of expertise that is labour economics in terms of the value placed on Sunday.

PN7015

JUSTICE ROSS: All right.

PN7016

MR DOWLING: Thank you.

PN7017

MR IZZO: Your Honour, I think part of the difficulty is that Mr Dowling is still dealing with part 5 in totality, whereas I have been trying to approach the paragraphs in a bit more of a piecemeal fashion. Mr Dowling has taken you to the last paragraph in that part which I hadn't actually addressed. What I would like to say is that each of the paragraphs preceding it, they all contain opinions. And what I was trying to establish is that some of these paragraphs are opinions that fall squarely within Professor Lewis's expertise. Given what Mr Dowling said, perhaps now I should move to the balance of the part.

PN7018

JUSTICE ROSS: Sure.

PN7019

MR IZZO: And then we can revisit the conclusion at the end. The balance of the part does fall broadly within the three categorisations, if you like, that the unions have given, to what the part deals with. And the first of those categorisations is the origins and history of penalty rates. That commences on the final paragraph at page 32 which talks about - - -

PN7020

JUSTICE ROSS: I understood Mr Dowling not to be - well, I can put it this way, he'd be getting too excited about that material.

PN7021

MR IZZO: Yes, your Honour. Because I mean the vast majority of 32 and 33 is actually Professor Lewis setting out cases, seminal cases relating to penalty rates. Now, I can see, I don't need Professor Lewis to do that, that can be a question for submissions. The reason it is in there is because it provides context to what he goes on to do later. So I do press for it to remain included because it explains what he is about to do later on. But certainly we don't need his opinion on what the seminal cases are, it's just helpful to say this is what the initial rationale was, and then he goes and looks to test some of those rationales when he analyses modern social mores.

PN7022

So in terms of pages 32 and 33, the reason I say they should remember is mainly related to context, as opposed to us needing his opinion on what seminal cases are related to penalty rates, it just sets up the rest of the part. So then we move to the second question, which is claimed - or second category, which is claimed changes over time in religious observance, that commences at the top of paragraph 34. If we ignore the very first sentence of paragraph - of the first paragraph at page 34 for immediate purposes, the rest of the page compiles ABS statistics data relating to - sorry, withdraw that, it's not ABS data. It's data that has been obtained from a National Church Life Survey, which itself came from the census.

PN7023

And what Professor Lewis has done is he has effectively reviewed the material and compressed it into a digestible format on this page, page 34, he has gone through and he is just reporting on the statistics, he has got a graphical representation at figure 13. Overleaf we see again there is a graphical representation of the survey he has analysed, and then there is a paragraph under the graph which again goes through and summarises the statistics from the survey he has reviewed. We say - if I can just summarise it that way, I will come back to my submissions about it in a moment.

PN7024

The next category is claimed changes over time, and the time use patterns of Australians. Now, that starts - I say that doesn't start under the heading "Value of time" because that is part of the paragraphs I referred to earlier which actually provide his view about the prevalence of weekend work. It really starts in the middle of page 36, the ABS produced estimates of individuals and households time use.

PN7025

From that point onwards what Professor Lewis is doing is effectively summarising ABS statistics he has reviewed. There is a number of different tranches of statistics he has looked at, and then overly he summarises the statistics in a table format. He then goes on and provides more detail about what he has reviewed and what the stats say under the table and overleaf on page 38 up until we really get to the Rose report. So the religious observance issues and the time

spent on leisure activities issue, all he is doing in the vast majority of these sections is summarising ABS statistical data he has reviewed, and the National Church Life Survey that is based on the census.

PN7026

Now, we say he is very well placed to do that because in addition to being a professor of economics his curriculum vitae identifies that he has substantial experience and expertise regarding research more generally. He is the director of the University of Canberra's Centre for Labour Market Research, and has been for 15 years. He is a visiting fellow at the Institute of Research for International Competitiveness, he was formerly the principal project officer at the Bureau of Labour Market Research, he was a research associate for the Centre for Federal and Regional Studies. He is a research associate for the Asia Research Centre between 1992 and 2000, and he consults to the Bureau of Immigration, Multicultural and Population Research.

PN7027

He is, and what he does, is predominantly focused on academic research and data analysis, it's part of what he does and what his centre does. He regularly works with ABS data and that is evident no more so than in this report itself because the balance of the report, which isn't objected to, has large sections of material that summarise ABS statistics, then draw conclusions from it. It's a large part of what he does and this really means that he is coming from a specialised area of expertise when it comes to dealing with ABS and other statistical-type data and effectively distilling it into a digestible format that can then be the subject of conclusion, et cetera.

PN7028

If at this point I can say, on a practical level there is another consideration for the Commission to consider. That is that the Commission has been accepting into evidence, in these proceedings, ABS statistics and similar-type survey or statistical evidence. We could seek to tender this information in that way, but it seems highly impractical and inefficient. Here we have a professor who is familiar with this type of material, who has looked at the material and digested it and turned it into a relatively short format, and that can now be presented.

PN7029

The alternative is for the Commission - for us perhaps to seek leave and file all the statistical data and then submissions on the data, and perhaps a witness statement of someone who has gone through it, which seems counterintuitive given we have someone who has done all of that work, is in a good position to do that work, a better position than any of the lawyers at this Bar table are, I assume, I can't say that for certain, but I assume. And so on that basis, when it comes to the discretionary factors that this Commission is to take into account when it applies the Evidence Act to these proceedings, the balance of convenience would largely favour admitting the evidence in this format rather than the Bench having to deal with very large tranches of ABS data and otherwise. So that is what we say about those two categories.

PN7030

The other thing I would say, and I have heard what Mr Moore has previously said about this type of submission, but I think it is a matter that is relevant for consideration, is that this - Professor Lewis has previously given evidence on this subject matter in this Commission. He has given that in the Two-Yearly Review Of Modern Awards before Deputy President Gooley, I have the case available if the Commission wants to see it. In that case not only was the evidence admitted without objection, but Deputy President Gooley in fact considered what Professor Lewis had said about social mores and things like that. Just to quote from one paragraph, her Honours talked about the fact that Professor Lewis said:

PN7031

The rationale on which the introduction of penalty rates in Australia was first based no longer exists. Sunday is not a day of religious observance for most Australians. Similarly, participation in sport and outdoor activity is minimal -

PN7032

And she goes on. That decision was appealed to a Full Bench, a five member Full Bench of the Commission. The five member Full Bench considered the Professor Lewis report, there was no issue taken with the nature of that evidence, and they again referred to that type of evidence in coming to their decision. So certainly this type of evidence has been accepted without issue in the past by this Commission. So that is what I say in relation to the vast majority of part 5.

PN7033

We are really left with one or two conclusions or opinions that are expressed. The first one is 34, the very first line of page 34. Professor Lewis says:

PN7034

While it may well have been the case that Sunday is the day of religious observance once, this is only true of a minority of Australians today.

PN7035

Yes, that's an opinion, it really is introducing the data he is about to give, that is something that we could really make a submission about based on the data he has summarised, and we would be happy to do so, so we probably don't need to press that first sentence. Equally, page 38, Professor Lewis, immediately before the Rose discussion, Professor Lewis says:

PN7036

Therefore, even under this extremely broad category of sport and outdoor activity, the time spent, even on weekends, is not large and pales into comparison with other activities.

PN7037

Now, yes, that is an opinion. It is an opinion that is expressed based on all of the work Professor Lewis has done in summarising the ABS data. So we say it does have some probative value because of the work preceding it in summarising employee activities and leisure activities on weekend days, so we do press that for inclusion. But they are really the only two opinions expressed in this part regarding the subject matter that are the subject of the union objections, the rest is all just summary of statistical data.

PN7038

JUSTICE ROSS: I thought that was in the summary paragraph.

PN7039

MR IZZO: Other than the summary paragraph. Your Honour, in respect of the summary paragraph, at the conclusion, again what Professor Lewis has done is he has now taken us through the religious observance data, he has taken us through leisure activity data, and he has also taken us through the changes in the labour market economy historically to where we are today.

PN7040

Based on all of that he then expresses views that we say are relevant to questions of labour supply and what employees would be willing to work for. And so yes, while some of it does touch on social mores, it's clear what the basis of those conclusions are, they are set out earlier on, and he does have expertise to be talking about questions about labour supply. So on that basis we press the conclusion. So that is our submissions regarding part 5. I also need to address part 6, I'm not sure if you want to hear from the other unions on part 5 first.

PN7041

JUSTICE ROSS: No, let's deal with your submissions on 6.

PN7042

MR IZZO: Part 6, there is two broad bases of objection. The first that both unions press is relevance. They say that part 6 deals with who would benefit from removing penalty rates, that there is no application before this Commission to remove penalty rates, therefore the conclusions herein are irrelevant. The first thing I would like to say is there is an application before this Commission to remove penalty rates, and that is in respect of casual workers on public holidays.

PN7043

There is presently casual work penalties and you will have to forgive me, it's either 225 per cent or 250 per cent for casuals working on a public holiday. The application of New South Wales Business Chamber and ABIs to entirely remove the public holiday penalty rate and the casual will only remain with their casual loading. That is a removal of the penalty rate, in my respectful submission.

PN7044

JUSTICE ROSS: Yes, all right.

PN7045

MR IZZO: Secondly, with respect to relevance, in respect to the claims more broadly - - -

PN7046

JUSTICE ROSS: What are the applications – you might just refresh my memory – about the late time – the evening penalty?

PN7047

MR IZZO: There's no applications from ABI and NSW Business Chamber about – I think there's a restaurant- - -

PN7048

JUSTICE ROSS: No, no, I know that, but I think there is from others.

PN7049

MR IZZO: There's a Restaurant and Catering application to reduce their evening penalty. They're not here with us, but I believe there is a Restaurant and Catering application to that effect.

PN7050

JUSTICE ROSS: Reduce or remove? That's all right, look- - -

PN7051

MR IZZO: It is a pertinent question, your Honour, but one unfortunately which I can't answer on the spot.

PN7052

JUSTICE ROSS: Yes. Can you assist?

PN7053

MR DIXON: I think, for the Fast Food Industry is an application for the period to be extended from 9 pm until 10 pm without the penalty applying.

PN7054

JUSTICE ROSS: So that would remove the penalty for the period from 9 to 10 pm?

PN7055

MR DIXON: Correct,

PN7056

JUSTICE ROSS: Yes, all right.

PN7057

MR SECK: I think there's a similar application by the Pharmacy Guild to extend working – ordinary hours.

PN7058

JUSTICE ROSS: All right. Look, I'm not sure we need to spend much time on this. The other observation I'd made is that I'm not sure the heading necessarily matches up with the text. The heading is, "Who would benefit from removing penalty rates?" At the end of the first paragraph, the question arises as to who would benefit from changes to penalty rates? And it would seem that could be something that could be explored in cross-examination of Professor Lewis as to what precisely he's looking at.

PN7059

But in any event, your point is well, there are applications to remove.

PN7060

MR IZZO: There are, your Honour, and I thought that a convenient way of – with respect to those applications that merely seek to reduce, and an alternative convenient way of dealing with this objection is for us to seek leave for Professor

Lewis to put on a very short opinion which effectively just explains the effect that his conclusions might have if penalty rates were to be reduced instead of removed.

PN7061

And I mean, this might be a question that arises for cross-examination anyway. If he was to file a short one-age or half a page document explaining his answer to that question.

PN7062

JUSTICE ROSS: Well, whether he files it or not, I'd have a question for him about what does he mean.

PN7063

MR IZZO: And that's why I think, if leave was to be granted, it would be helpful and it's something that can be filed by 12 pm today, together with his reply evidence, your Honour. So I think we make that application, because it will just assist the parties.

PN7064

JUSTICE ROSS: All right. Mr Dowling?

PN7065

MR DOWLING: Thank you, your Honour. Can I just say two very quick things in relation to part 5? I think what's said against us is that what Professor Lewis is really working with data and he's qualified to work with data. Well, if that were taken to its logical conclusion, he could work with any data. He must work within data within his field of expertise, and that's not what he's doing in part 5.

PN7066

Secondly, the Bench should know and should be aware, and this applies to both part 5 and part 6, Professor Lewis wasn't asked to do either of these things that he sets out in part 5 or part 6. The Bench will see – we have one copy of- - -

PN7067

JUSTICE ROSS: Yes. No, I see it. I've noted that you make that point in your submission.

PN7068

MR DOWLING: Yes, I think we made it more particularly with respect to part 6. We should have made it with respect to both. None of the things he was asked to do, asked him to assess the value of weekend time or to say what would flow from the removal of penalties or who would benefit from the removal of penalties.

PN7069

JUSTICE ROSS: I'm struggling to see what the relevance of that point is though. He might not have been asked, but isn't the point whether it's relevant and whether he has the requisite expertise?

PN7070

MR DOWLING: It is – it is. The real point becomes, I think, whether it's incidental to those things he was asked to do. And it might be that he was asked

to answer five questions. He does so and as necessary process in dealing with that, he has to deal with two other parts. Now, in our submission, you could quite clearly excise part 5 and part 6 and it would not undermine what he says in the rest of the report.

PN7071

JUSTICE ROSS: It's not an inadmissibility point. The fact that he's strayed beyond what he was asked in the instructions, it's not inadmissible simply because of that.

PN7072

MR DOWLING: No, no.

PN7073

JUSTICE ROSS: What do you say about, given what you've heard, that there is, in fact, an application to remove penalty rates?

PN7074

MR DOWLING: Yes. Yes, well certainly, I think the only thing we can say in response – well, firstly, in response to your Honour's point about whether he is talking about changes or removal.

PN7075

JUSTICE ROSS: And I'm just not sure because of the language of that last sentence, really.

PN7076

MR DOWLING: Yes. He does – your Honour will see in the penultimate paragraph, under the part where he's setting out his conclusions, the biggest beneficiaries from removing penalty rates- - -

PN7077

JUSTICE ROSS: Yes.

PN7078

MR DOWLING: - - -would be consumers and then again, in the last paragraph, the removal of penalty rates.

PN7079

JUSTICE ROSS: Yes.

PN7080

MR DOWLING: So it seems that the part, read on balance, is consistent with him approaching it on the basis of- - -

PN7081

JUSTICE ROSS: Might be.

PN7082

MR DOWLING: Yes.

PN7083

JUSTICE ROSS: But in any event, your point's gone to the extent that there is an application to remove penalty rates, is it?

PN7084

MR DOWLING: Yes. We accept that, other than the application is quite a confined one and it doesn't appear that Professor Lewis is dealing with that in quite the same way.

PN7085

JUSTICE ROSS: Well, I'm not sure what he's dealing with, but- - -

PN7086

MR DOWLING: Yes.

PN7087

JUSTICE ROSS: Look, there are two ways, and I mean I'll have some questions for Professor Lewis about this section, if it remains in, about what is it directed to. It's whether you think that might be best dealt with by the supplementary statement, so you know what he's going to be saying about that and give you an opportunity to think about whether you want to cross-examine on it.

PN7088

MR DOWLING: Yes. That's the first we've heard of that proposal and I guess we're – the only concern is whether any prejudice might arise and whether we're given adequate time for the other labour economist to deal with it.

PN7089

JUSTICE ROSS: Sure, but well, you're going to be face with me asking him questions in evidence in response. So- - -

PN7090

MR DOWLING: We accept that, we have more time than that situation, yes.

PN7091

JUSTICE ROSS: Yes.

PN7092

MR DOWLING: Yes.

PN7093

JUSTICE ROSS: And it is a review, so it'll have a degree of the inquisitorial about it.

PN7094

MR DOWLING: Yes.

PN7095

JUSTICE ROSS: And what's your preference?

PN7096

MR DOWLING: Well- - -

PN7097

JUSTICE ROSS: I'm content to leave it for you to consider and discuss it with Mr Izzo and if you both agree on a particular course, then you can take it that we'd be content with that course, if that involves filing material.

PN7098

MR DOWLING: Yes. Well, it might be the other union parties, Mr Moore might have something to say about it too.

PN7099

JUSTICE ROSS: Sure, absolutely, yes.

PN7100

MR DOWLING: So it might be prudent to let us consider it.

PN7101

JUSTICE ROSS: No, no, that's absolutely fine, yes.

PN7102

MR IZZO: That would probably be my preference as well, your Honour, so I might – I'm happy to withdraw the application and discuss it with the union parties.

PN7103

JUSTICE ROSS: Yes, that's fine. But I just wanted to put you on notice that, when I read that part, I wasn't quite sure what he was going to and I would be seeking to clarify it, if that part remains. Okay.

PN7104

MR DOWLING: Thank you, your Honour.

PN7105

JUSTICE ROSS: Anything you want to say, Mr Moore, about any of this?

PN7106

MR MOORE: No, your Honour.

PN7107

JUSTICE ROSS: All right. Okay, we'll reserve in relation to that issue too. We'll endeavour to get to a decision Monday or Tuesday at the latest. Okay?

PN7108

MR DOWL: I'm sorry, your Honour.

PN7109

JUSTICE ROSS: No, that's- - -

PN7110

MR DOWL: There was one other issue.

PN7111

JUSTICE ROSS: Yes, there's the- - -

PN7112

MR DOWL: The documents in respect of Mr Parker.

PN7113

JUSTICE ROSS: Is he here?

PN7114

MR DOWL: Mr Clarke is connected to a video-link and we promised your Honour it would take less than 10 minutes, and we have nine.

PN7115

JUSTICE ROSS: No, no, that's fine. Mr Clarke, you there?

PN7116

MR CLARKE: Yes, your Honour.

PN7117

JUSTICE ROSS: Okay, well can I ask you, Mr Dowling, I take it the issue is the redacted – I've only got the email of 16 April that has any redactions. Is that the one we're talking about?

PN7118

MR DOWLING: There are two issues, your Honour. The first is that the email of 16 April has two redactions.

PN7119

JUSTICE ROSS: Yes.

PN7120

MR DOWLING: That's the only email that's redacted.

PN7121

JUSTICE ROSS: Yes.

PN7122

MR DOWLING: You'll see, in the third line, it goes to what was a significant point in respect of his evidence, and that's where the 17,000 came from.

PN7123

JUSTICE ROSS: Yes. I was less concerned about the second redaction. I don't see why it's of any concern or relevance how much the exercise cost, particularly.

PN7124

MR DOWLING: Well, only peripherally perhaps, your Honour, that because there was a discussion in cross-examination, you might remember, about how the 1,000 was chosen. And I think the reference was, or the answer was, it was chosen as a result of price, really. But we accept that, your Honour, we accept the first redaction is the most important.

PN7125

JUSTICE ROSS: Yes.

PN7126

MR DOWLING: The other issue, your Honour, that we agitate is, you will see – perhaps if your Honour goes to the second email to make good this point, the email of 10 April.

PN7127

JUSTICE ROSS: Just bear with me for a moment. Yes.

PN7128

MR DOWLING: It starts, "James, this all looks very logical". And that's coming from Mr Hart. So it's very clear, from this – and perhaps if I can ask you to turn – ask the Full Bench to turn to the last email.

PN7129

JUSTICE ROSS: You mean the one at 8 April, the first in the sequence or?

PN7130

MR DOWLING: Sorry, 21 April, which is the last of the five pages if the Full Bench's is in the same order as mine – I hope they are.

PN7131

JUSTICE ROSS: Yes.

PN7132

MR DOWLING: And that the "re" there is version 3.

PN7133

JUSTICE ROSS: Yes.

PN7134

MR DOWLING: And it starts, "This looks good". What's clear in respect of, or arising from both of those emails, is there's responses from Mr Parker that inform what it is Mr Hart wants. We can't make complete sense of what it is Mr Hart wants or is asking for without seeing both sides of that email chain, in our submission. We don't understand they're not available, we just understand they're - the employer party in this case is refusing to provide them.

PN7135

So what we ask for is (1) the unredacted version of the second of the – or the email of 16 April and (2) both sides of the email chain.

PN7136

JUSTICE ROSS: All right. Thank you. Mr Clarke, let's deal with the redaction issue first.

PN7137

MR CLARKE: Yes, your Honour.

PN7138

JUSTICE ROSS: That relate to the email of 16 April. Without verballing you, Mr Dowling, no doubt you will tell me if I am. The redaction in relation to the budget isn't pressed, but the redaction in relation to where the 17,000 phone

numbers came from is, and on the face of it you will recall that was the debate in the case, where did this database come from? Why does that need to be redacted?

PN7139

MR CLARKE: Your Honour, we just say it's commercially sensitive material where that database came from.

PN7140

JUSTICE ROSS: Then it can be provided on a commercially sensitive basis and can be subject to an order.

PN7141

MR CLARKE: If it's provided on a commercially sensitive basis I can get instructions along those lines, your Honour.

PN7142

JUSTICE ROSS: All right. We might frame an order to protect your interests in relation to that. What about the email chain?

PN7143

MR CLARKE: Your Honour - - -

PN7144

JUSTICE ROSS: It's difficult to make sense of emails if you have only got one side of them.

PN7145

MR CLARKE: Yes, your Honour, we expressly followed the directions as we understood them from the Full Bench emanating from the transcript. We point out that this is the union's fourth bite at this cherry with regards to information around correspondence between the Association and Mr Parker, and all we could do - what we did was what we were ordered to do is follow the directions of the Full Bench.

PN7146

JUSTICE ROSS: All right. Subject to you checking them and seeking an order that the material be treated in confidence there is no objection to providing the other side of the email chain?

PN7147

MR CLARKE: Your Honour, there is an objection. There is an objection on the basis that this is the fourth application if you like or the fourth opportunity the union has taken on this point.

PN7148

JUSTICE ROSS: I am not sure how to regard that as an objection. That might be the case. Is there anything else you want to say about that?

PN7149

MR CLARKE: No, your Honour. In the alternative if they are to be provided we just seek this information be provided on the same basis, your Honour.

PN7150

JUSTICE ROSS: I suppose you will need to look at it to make that assessment.

PN7151

MR CLARKE: So, your Honour, I have sighted that information.

PN7152

JUSTICE ROSS: All right. Mr Dowling, if it's provided and subject to a confidentiality order is that the way through?

PN7153

MR DOWLING: Yes, we wouldn't oppose such an approach, your Honour.

PN7154

JUSTICE ROSS: All right. Then we will deal with it on that basis. Can I ask counsel to settle the form of the order to protect the confidentiality of the information, and, Mr Clarke, if you can provide it on that basis and it will be the subject of a confidentiality order. Okay?

PN7155

MR CLARKE: Thank you, your Honour.

PN7156

JUSTICE ROSS: I am sensing we are not quite finished. Anything else, Mr Dowling?

PN7157

MR DOWLING: The timetabling issue for the 30th, the 1st and the 2nd I understand your Honour is going to deal with without the fellow members of the Full Bench.

PN7158

JUSTICE ROSS: Yes, I thought I would let them go, but we can deal with that now. They will be riveted I am sure. It might be convenient to deal with it now if you want to.

PN7159

MR DOWLING: I think my learned friend has something to say.

PN7160

MR MOORE: The matter I wish to raise as a courtesy to the Commission might inform the matter of listings for the sittings commencing on the 30th. I became aware last night of some difficulties arising from the reply material, reply statement that Professor Rose filed. Professor Rose filed, I think it's fair to say an extensive and detailed reply statement responding to Professor Altman's report. I read that yesterday, I think it was filed late on the night before, and efforts have now been undertaken to speak of course to Professor Altman in relation to that reply statement. Now what has been discovered is that Professor Altman is currently overseas and is not back until sometime over the weekend, and so far as I understand at the moment is only back in Australia fleetingly early next week

before he departs overseas again. I am told that while he's back in Australia for a couple of days next week he has a full diary of commitments.

PN7161

These matters came to my attention last night. I am concerned about them because in order to deal with Professor Rose in cross-examination next Friday it will be absolutely essential for me to speak with Professor Altman. I just want to raise now that there could be difficulties in that regard. Efforts are being undertaken now to seek confirmation from Professor Altman as to whether or not there will or will not be sufficient time to obtain his response to Professor Rose's statement, but as things stand now I am pessimistic, and if that pessimism crystallises into a position where we are not able to get proper instructions about Professor Rose's reply statement we may need to make an application, which of course we would do quickly, to the effect that Professor Rose's evidence - that Professor Rose not give evidence next Friday.

PN7162

JUSTICE ROSS: Wouldn't it be a question if he could be cross-examined next Friday in relation to his report, but not the reply?

PN7163

MR MOORE: Yes.

PN7164

JUSTICE ROSS: That would be the worst case scenario on your - - -

PN7165

MR MOORE: Well, we would have no difficulty with that. The difficulty that perhaps is anterior to that is that that would involve Professor Rose having to come along twice which might want to be avoided.

PN7166

JUSTICE ROSS: Let's see how all of that emerges. There is no application before us at the moment.

PN7167

MR MOORE: No. I felt it incumbent upon me just to raise that today.

PN7168

JUSTICE ROSS: No, no absolutely. Yes.

PN7169

MR MOORE: We don't want to disrupt the scheduled hearings, but I do see an issue of concern looming.

PN7170

JUSTICE ROSS: All right, well let's see how it develops. Something to look forward to. Yes, Mr Dowling?

PN7171

MR DOWLING: Just three short matters, your Honour. I think it's still outstanding where those three days - we are now talking about 30 September and

1 and 2 October - where those days will be. I think the preference from the union parties, and there is some agreement to this, if not complete agreement, that it be Melbourne. We reserve our rights about the prejudice that might flow from sitting on a public holiday of course, your Honour, but - - -

PN7172

JUSTICE ROSS: The way it's going your team probably won't be in it, Mr Dowling, unless you're supporting one of the interstate teams, but anyway.

PN7173

MR DOWLING: The only then remaining issue is the experts to be allocated, and subject to - sorry, I withdraw that. The agreement that I understand is reached by all of the parties present is that Ms Pezzullo, subject to the results of today, would give her evidence on 30 September and if she is still required after that day part of 1 October, and the remaining parts of 1 and 2 October would be Professors Lewis, Quiggin and Borland. They would get on a worst case scenario perhaps one and a half days the three of them and possibly more depending on Ms Pezzullo. They're the only matters.

PN7174

JUSTICE ROSS: Does anyone have a different view to that proposition?

PN7175

MR IZZO: Your Honour, I have no different view. I think the employed parties are broadly comfortable with that proposal. I have just one thing I wanted to raise because it has arisen in various exchanges that have occurred in the proceedings today. There has been some discussion about whether Quiggin, Borland and Professor Lewis would give concurrent evidence. We have reservations to that approach, which I am happy to perhaps expand upon if required, but we would prefer that the evidence is given as would occur normally with other witnesses in the sense of cross-examination of each expert independently, and so we would request to be heard about whether evidence is given concurrently or not if that is to occur.

PN7176

JUSTICE ROSS: As long as the witnesses are available on that time you would certainly be given an opportunity to be heard about it. We will want to consider it as well. The main thing is that they're going to be available over that period, and it may be that it's a combination approach, that they might give some of their evidence separately where they're subject to the main bit of cross-examination, and the bits where they're dealing with the reply material to the evidence of others might be the subject of concurrent evidence. So if you can give some thought to that.

PN7177

On the face of it where you have a witness commenting on the evidence of another witness it's often helpful to have both of them there so they can respond as the evidence evolves. It avoids having to recall - if some further evidence is given in cross-examination then it avoids having to recall the other witness, but you may be able to address your concern by having each witness cross-examined in respect of their own evidence and then to the extent they deal with the evidence of others

then that's dealt with concurrently. So it's not necessarily an all or nothing approach.

PN7178

MR IZZO: And, your Honour, there may be some arrangements - - -

PN7179

JUSTICE ROSS: But I would encourage counsel to have some discussion about that and how you see it working, and there will be another opportunity next Friday and we can develop that further. All right?

PN7180

MR IZZO: Thank you, Your Honour.

PN7181

JUSTICE ROSS: Is there anything you want to say about that, Mr Dowling, at this stage?

PN7182

MR DOWLING: No, your Honour, we're content to have some discussions and see how that develops.

PN7183

JUSTICE ROSS: And I think the employer parties are getting close to working out who they want to cross-examine amongst the union.

PN7184

MR IZZO: I can confirm that all experts are required for cross-examination. The question that remains outstanding is the length of time.

PN7185

JUSTICE ROSS: All right. As I foreshadowed earlier in the case there will be occasions during I think the retail lay evidence where not all members of the Bench will be present because of other commitments and that will also be the case during part of the expert evidence because of other commitments, but the members who are not able to be available will read the transcript and participate in the decision in relation to it. It's not a case where that may not be true of some of the lay evidence, but where particularly credit issues - we are not looking at a car accident and trying to work out who did what - so I don't imagine that would create any problems, but if it does then people need to let us know as soon as possible. Nothing further? Thanks for your attendance.

ADJOURNED UNTIL TUESDAY, 22 SEPTEMBER 2015

[11.36 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #PG1 AFFIDAVIT OF SHARLENE WELLARD DATED
17/09/2015 PN6802**

EXHIBIT #RETAIL 1 STATEMENT OF PROFESSOR SANDS PN6914